Fourth Amendment independent of any privacy interest in the premises searched. This Court should also grant Kevin Sharp's petition because, although the Alabama Court of Civil Appeals fundamentally misapplied the law, this Court's Fourth Amendment jurisprudence requires clarification regarding the protection of property rights under the Amendment.

The Alabama Court of Civil Appeals held that Kevin Sharp did not have "standing" to challenge the seizure of its property because Petitioner had not demonstrated an ownership or other interest in the two arcades that would give Petitioner a "reasonable expectation of privacy." *See* App. 6. In reaching that conclusion, the Alabama Court of Civil Appeals relied on an Alabama Court of Criminal Appeals opinion interpreting the decisions of this Court in *Rakas v. Illinois*, 439 U.S. 128 (1978); *Mancusi v. DeForte*, 392 U.S. 364 (1968); *Simmons v. United States*, 390 U.S. 377 (1968); and *Katz v. United States*, 389 U.S. 347 (1967). *See* App. 4-5 (quoting *Draper v. State*, 641 So.2d 1283, 1285 (Ala. Crim. App. 1993)). The Alabama Court of Civil Appeals also relied on its own decision in *Johnson v. State*, 667 So.2d 105 (Ala. Civ. App. 1995), which "applied the same principles regarding standing discussed in *Draper*. . . ." App. 5. However, *Johnson* and *Draper* did not concern any claims of ownership of seized property, and, therefore, are factually dissimilar from this case as Kevin Sharp's ownership of the seized property was never in dispute. *See Johnson*, 667 So. 2d at 106-08; *Draper*, 641 So. 2d at 1285. The appellate court's failure to recognize this distinction led it to fundamentally misapply the law.

The decision of the Alabama Court of Civil Appeals in this case resulted in a fundamental misapplication of Fourth Amendment jurisprudence because the decisions of

this Court hold that the proper inquiry in a Fourth Amendment case is not one of "standing" but of the rights protected under the Amendment and that property rights are protected independent of any right to privacy. *See Soldal v. Cook County*, 506 U.S. 56, 62-65 (1992); *Rakas v. Illinois*, 439 U.S. 128, 138-39 (1979). Thus, the Alabama Court of Civil Appeals misapplied the law in at least two respects.

The Alabama Court of Civil Appeals first misapplied the law by using a mechanical "standing" analysis. This Court long ago rejected the concept of standing as the proper analysis for one's ability to pursue a Fourth Amendment challenge. *See Rakas*, 439 U.S. at 138-39. In *Rakas*, for example, this Court proclaimed that "we think the better analysis focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing." *Id.* at 139. The Alabama Court of Civil Appeals, though, did not look at Kevin Sharp's rights in the seized video games but incorrectly focused on the existence of a "right to privacy" in the premises searched.

However, this Court has recently confirmed that the Fourth Amendment protects one's rights in seized property irrespective of whether any privacy right has also been violated. *See Soldal*, 506 U.S. at 62-65. This Court preliminarily noted in *Soldal* that the Fourth Amendment's plain "language surely cuts against the novel holding below, and our cases unmistakably hold that the Amendment protects property as well as privacy." *Id.* at 62. This Court also held that "[w]e thus are unconvinced that any of the Court's prior cases supports the view that the Fourth Amendment protects against unreasonable seizures of

property only where privacy or liberty is also implicated." *Id.* at 65. Thus, by ignoring Kevin Sharp's property rights in the seized property, the Alabama Court of Civil Appeals plainly misapplied the law.

Although the Alabama Court of Civil Appeals fundamentally misapplied the law, review by this Court is also desirable because the decisions of this Court have created confusion regarding the extent of the protections afforded by the Fourth Amendment. As discussed, in this case the Alabama Court of Civil Appeals relied upon prior interpretations of this Court's older decisions, including *Mancusi v. DeForte*, 392 U.S. 364 (1968). *See* App. 4-5. The Alabama Court of Civil Appeals was led astray by the statement in *Mancusi* "that capacity to claim the protection of the Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion." *See* App. 5 (quoting *Draper v. State*, 601 So.2d 1283, 1285 (Ala. Crim. App. 1993), quoting *Mancusi*, 392 U.S. at 368 (citing *Katz v. United States*, 389 U.S. 347, 352 (1967))). The statement in *Mancusi* is inconsistent with the more recent decision of this Court in *Soldal*, yet courts continue to look to *Mancusi* for guidance regarding the interests protected under the Fourth Amendment. Therefore, this Court should grant Kevin Sharp's petition to clarify the interests protected by the Fourth Amendment, which will avoid future misapplication of the law.

II. Whether, *consistent* with due process, seized property may be forfeited based on the application of a post-seizure judicial decision which invalidated a statutory exception to a controlling criminal statute.

In addition, this Court should grant Kevin Sharp's petition for a writ of certiorari with regard to the violation of Petitioner's due process rights because, in holding that the application of new legal standards invalidating a controlling exception to the state's gambling laws did not violate Kevin Sharp's rights, the Alabama Court of Civil Appeals fundamentally misapplied the law. The decision of the Alabama Court of Civil Appeals is inconsistent with this Court's decisions in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), and *Marks v. United States*, 430 U.S. 188 (1977), because *Bouie* and *Marks* establish that the same fair warning principle applicable to legislatures through the *ex post facto* clause also applies to the courts through the due process clauses of the Fifth and Fourteenth Amendments. *See Marks*, 430 U.S. at 191-92; *Bouie*, 378 U.S. at 351-52. Given the age of the *Bouie* and *Marks* decisions, though, granting this petition is further warranted to reinforce the continued vitality of those decisions.

This Court has recognized that "[r]etroactivity is generally disfavored in the law . . . in accordance with 'fundamental notions of justice' that have been recognized throughout history." *Eastern Enters. v. Apfel*, 524 U.S. 498, 532 (1998) (per O'Connor, J, with three Justices concurring) (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988), and quoting *Kaiser Aluminium & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)). The *ex post facto* clause is a primary bulwark

against the imposition of retroactive penalties, although it has long been held to be limited to legislative enactments. *See Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390-391 (1798). However, the same principle upon which the *ex post facto* clause is based, the principle of fair warning, also applies to judicial decisions through the due process clauses of the Fifth and Fourteenth Amendments. *See Marks*, 430 U.S. at 191-92; *Bouie*, 378 U.S. at 353-54. Both *Marks* and *Bouie* hold that the due process clause prohibits the courts from achieving through judicial construction of a statute that same result prohibited to the legislature under the *ex post facto* clause. *See Marks*, 430 U.S. at 191-92; *Bouie*, 378 U.S. at 353-54.

The decision of the Alabama Court of Civil Appeals that Kevin Sharp was not denied due process cannot stand given this Court's decisions in *Marks* and *Bouie* because the lower court's forfeiture of Kevin Sharp's property based upon changes in statutory construction that occurred after the seizure of the property plainly imposed a penalty upon Kevin Sharp without fair warning. First, Alabama considers forfeiture actions to be penal in nature. *See Reeder v. State ex rel. Myers*, 314 So. 2d 853 (Ala. 1975). Second, Kevin Sharp had no prior, fair warning that its video games were subject to seizure as illegal gambling devices in the nature of lotteries. Thus, the Alabama Court of Civil Appeals fundamentally misapplied the law in finding no due process violation.

The forfeiture of Kevin Sharp's video games was premised upon violations of the state's criminal gambling statutes, but Kevin Sharp had relied on an exception contained in the Alabama Amusement Games Act (the

"Amusement Act" or "the Act"), Ala. Code § 13A-12-76, for games requiring at least "some skill."[4] Kevin Sharp supplied its games based upon a good faith reading of the plain language of the Amusement Act and upon prior court decisions interpreting the Act. The later decisions of the Alabama courts, after Kevin Sharp's games had been seized, to re-write the Amusement Act by requiring "skill predominant" games rather than the "some skill" games allowed under the Act's plain wording effected the same type of expansion of liability that this Court found unconstitutional in both *Bouie* and *Marks*. *See Marks*, 430 U.S. at 188; *Bouie*, 378 U.S. at 362 ("We think it clear that the South Carolina Supreme Court, in applying its new construction of the statute to affirm these convictions, has deprived petitioners of rights guaranteed to them by the Due Process Clause.").

The some skill standard was well-established in Alabama law given that for over one hundred years state courts had applied that standard to questions of whether an activity violated the state's prohibition against lotteries. *See Minges v. City of Birmingham*, 36 So. 2d 93 (Ala. 1948); *Johnson v. State*, 34 So. 1018 (1903); *Loiseau v. State*, 22 So. 138 (Ala. 1897); *Reeves v. State*, 17 So. 104 (Ala. 1894); *Yellow-Stone Kit v. State*, 7 So. 338 (Ala. 1890), *implied overruling on other grounds rec'd*, *Clark v. State*, 80 So. 2d 312 (Ala. 1955). Nevertheless, the decisions of the Alabama courts in *State v. Ted's Game Enterprises*, 893 So. 2d 355 (Ala. Civ. App. 2002) (*Ted's I*), and *Ex parte Ted's Game Enterprises*, 893 So. 2d 376 (Ala. 2004) (*Ted's II*), invalidated the Amusement Act's exception to the

[4] As previously noted, the text of the statute is reproduced in full in the Appendix. *See* App. 20-24.

criminal gambling laws for "some skill" games and held that games must be "skill predominant" to avoid Alabama's prohibition on lotteries. In other words, the *Ted's I* and *Ted's II* courts expanded the scope of the state's criminal gambling statutes.

However, because the forfeiture of Kevin Sharp's video games was premised on violations of the state's criminal gambling statutes and because Alabama considers forfeiture actions to be penal, the *Ted's I* and *Ted's II* decisions could not, consistent with due process, have been applied in deciding whether the games should be forfeited. The application of such a retroactive expansion of a criminal statute could not have been accomplished through legislation and, therefore, cannot be accomplished through judicial decisions that have the effect of re-writing legislation. As this Court held in *Bouie*, "[i]f a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Bouie*, 378 U.S. at 353-54.

Consequently, the decision of the Alabama Court of Civil Appeals fundamentally misapplied the law in holding that Kevin Sharp's due process rights were not violated by the imposition of a penalty based upon an expansion of the criminal law which occurred after Kevin Sharp's property had already been seized. This Court should grant the petition for a writ of certiorari because of the state court's fundamental misapplication of the law. This Court should also grant the petition for certiorari to reaffirm the vitality of this Court's decisions in *Marks* and *Bouie*.

CONCLUSION

For these reasons, Petitioner Kevin Sharp Enterprises respectfully requests that this Court issue a writ of certiorari to the Alabama Court of Civil Appeals to review the state court's decision in this case.

Respectfully submitted,

JOHN M. BOLTON, III
R. BRIAN TIPTON

December 7, 2005

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2004-2005

2040063

Kevin Sharp Enterprises, Inc.

v.

State of Alabama ex rel. John Tyson, Jr., District Attorney.

Appeal from Mobile Circuit Court (CV-01-1949, CV-01-1952)

Jun. 3, 2005

THOMPSON, Judge.

This is an appeal from a judgment ordering that certain property be forfeited pursuant to § 13A-12-30, Ala.Code 1975.

On May 3, 2001, investigators with the Mobile County District Attorney's Office ("the DA's office") executed search warrants on the Game Room/Lucky 7 and the Mardi Gras Arcade (hereinafter together referred to as

"the gaming establishments"). While executing the two search warrants, the investigators seized, in addition to "assorted gift cards" and "gift certificates," a total of 127 gaming machines and $11,340.43 in United States currency.

On June 7, 2001, the State of Alabama filed two separate complaints seeking the forfeiture, pursuant to § 13A-12-30, of the property and currency seized by the investigators for the DA's office. Kevin Sharp Enterprises, Inc. ("KSE"), answered in each case and asserted a claim of ownership of the gaming machines and the currency; according to the affidavit of Kevin Sharp, the president of KSE, KSE "supplied" the gaming machines to the two gaming establishments from which those machines were seized. In its answer, KSE also denied that the machines at issue were illegal gaming devices. The two actions were consolidated in the trial court.

Both KSE and the State filed motions for a summary judgment. On September 1, 2004, the trial court entered an order in which it, among other things, granted the State's motion for a summary judgment, denied KSE's motion for a summary judgment, and ordered that the gaming devices and a total of $2,841 in currency be forfeited.[1] KSE timely appealed. This case was transferred to this court by the supreme court, pursuant to § 12-2-7(6), Ala. Code 1975.

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[1] Also in that judgment, the trial court noted that the interest in the property and currency claimed by John Kelly, the operator of the Mardi Gras Arcade, had already been adjudicated and that Clifton Sons, the operator of the Game Room/Lucky 7, had disclaimed any interest in the property and currency seized.

A brief statement of the relevant facts is all that is necessary for the disposition of this appeal. The record indicates that the search warrants executed by the investigators for the DA's office were based on two virtually identical affidavits executed by Dale Leddick, an investigator for the DA's office. In those affidavits, Leddick stated that he had been advised by an "officer" and a confidential source that gaming machines were present on the premises of the two gaming establishments and that those machines were used in a capacity that constituted illegal gambling.

According to the record, criminal charges in connection with the execution of the search warrants were filed against John Kelly, the operator of the Mardi Gras Arcade. In that criminal proceeding, Kelly moved to suppress the evidence seized as a result of the execution of the search warrant on the Mardi Gras Arcade. In his motion to suppress, Kelly argued that the search warrant was issued without probable cause and that the affidavit upon which the search warrant was obtained was based on hearsay. The court hearing the criminal matter against Kelly granted Kelly's motion to suppress. In a supplement to its motion for a summary judgment, KSE, citing the criminal case against Kelly, asserted that the search warrants were due to be suppressed in this civil-forfeiture action.

During the time this matter was pending in the trial court, this court issued its opinion in *State ex rel. Tyson v. Ted's Game Enterprises,* 893 So.2d 355 (Ala. Civ. App. 2002), and our supreme court affirmed this court's judgment in *Ex parte Ted's Game Enterprises,* 893 So.2d 376 (Ala. 2004). In those cases, the courts concluded that § 13A-12-76, Ala. Code 1975, which exempts from the State's criminal gambling statutes any machines that

require "some skill," could not be applied to legalize gaming machines such as the ones at issue in this matter.

Before the trial court, KSE essentially conceded that its gaming machines were similar to those addressed in *Ex parte Ted's Game Enterprises,* supra, and, therefore, that those machines violated the criminal gambling statutes. However, in its summary-judgment motion before the trial court, KSE argued that *Ex parte Ted's Game Enterprises,* supra, constituted an ex post facto change in the law that deprived KSE of its due-process rights to "fair warning" that its gaming machines might violate the criminal gambling statutes.

On appeal, KSE first argues that the trial court erred in refusing to "suppress" the gaming machines seized in the May 3, 2001, searches of the gaming establishments because, it contends, those machines were seized based on invalid search warrants. The State argues before this court, as it did before the trial court, that KSE has no standing to object to the search warrants because KSE does not own or operate either establishment from which the gaming machines were seized; therefore, the State argues, KSE had no expectation of privacy in either establishment.

> "'When a motion to suppress evidence in a criminal case is based on the ground that the evidence was obtained in violation of the Fourth Amendment, one issue is whether the movant has standing to assert the claim and to seek the remedy of exclusion. See LaFave, 4 *Search and Seizure* § 11.3 (2d ed.1987). The rights afforded protection by the Fourth Amendment are personal rights. See *Simmons v. United States,* 390 U.S. 377, 389, 88 S.Ct. 967, 974, 19 L.Ed.2d

> 1247 (1968). To show that a party has standing to object to a search, the party must have a possessory interest in the premises searched. *Rakas v. Illinois,* 439 U.S. 128, 134, 99 S.Ct. 421, 425, 58 L.Ed.2d 387 (1978). . . . The "'capacity to claim the protection of the [Fourth] Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion.'" *Mancusi v. DeForte,* 392 U.S. 364, 368, 88 S.Ct. 2120, 2123, 20 L.Ed.2d 1154 (1968), quoting *Katz v. United States,* 389 U.S. 347, 352, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967). "A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." *Rakas,* 439 U.S. at 134, 99 S.Ct. at 425.'
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> "*Williams v. State,* 601 So.2d 1062, 1070 (Ala. Crim. App. 1991)."

Draper v. State, 641 So.2d 1283, 1285 (Ala. Crim. App. 1993) (holding that the appellant had no standing to challenge a search of the apartment of an acquaintance).

This court has applied the same principles regarding standing discussed in *Draper,* supra, a criminal case, in a civil-forfeiture case. In *Johnson v. State,* 667 So.2d 105 (Ala. Civ. App. 1995), the State sought to condemn certain currency it had seized during a search of a vehicle, and Johnson claimed ownership of that currency. Johnson claimed that the vehicle from which the currency was seized was registered in her name, but she produced no documentation to support her claim. The evidence indicated

that the vehicle was registered in someone else's name. The trial court ordered that the currency be forfeited to the State. This court affirmed, concluding that the evidence supported a conclusion that Johnson had not demonstrated any ownership or possessory interest in the vehicle. In so holding, this court noted that the burden was on Johnson to "establish her standing to challenge the search of the vehicle." *Johnson v. State,* 667 So.2d at 107.

In this case, KSE has asserted only a claim of ownership of the gaming machines and of the currency that was seized on May 3, 2001. KSE has not asserted, much less presented any evidence indicating, that it had any ownership interest or possessory interest in either of the gaming establishments from which the property and currency was [sic] seized. KSE has not explained how it might claim a reasonable expectation of privacy in the gaming establishments that would give it standing to challenge the May 3, 2001, search of those establishments. *See Johnson v. State,* supra; and *Draper v. State,* supra. Therefore, we must agree with the State's contention that KSE has failed to meet its burden of demonstrating that it has standing to challenge the search of the gaming establishments. *See Johnson v. State,* supra.

KSE next argues that the summary judgment was improper because, KSE contends, it was based on an impermissible ex post facto change in the law. In this case, we are not concerned with a true ex post facto law, because no legislative act has changed the criminal gambling statutes since the May 3, 2001, seizure of the gaming machines. Rather, KSE argues that our supreme court's opinion in *Ex parte Ted's Game Enterprises,* supra, constitutes an impermissible ex post facto "change" in the law. The United States Supreme Court has held that the

prohibition against ex post facto legislative enactments also applies to judicial decisions:

> "[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the [United States] Constitution forbids. An *ex post facto* law has been defined by this Court as one 'that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action,' or 'that *aggravates* a *crime* or makes it *greater* than it was, when committed.' *Calder v. Bull,* 3 Dall. 386, 390. If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction."

Bouie v. City of Columbia, 378 U.S. 347, 353-54, (1964) (footnote omitted). *See also Marks v. United States,* 430 U.S. 188, 191 (1977) ("The *Ex Post Facto* Clause is a limitation upon the powers of the Legislature, and does not of its own force apply to the Judicial Branch of government. But the principle on which the Clause is based – the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties – is fundamental to our concept of constitutional liberty." (citations omitted)).

The prohibition against the enactment of ex post facto laws applies to penal or criminal matters rather than to civil actions. *Adams v. State,* 428 So.2d 117, 119 (Ala. Civ. App. 1983); *Ward v. State,* 42 Ala. App. 529, 531, 170 So.2d 500, 501-02 (1964); *see also United States v. D.K.G. Appaloosas, Inc.,* 829 F.2d 532, 540-46 (5th Cir. 1987) (discussing the

applicability of the Ex Post Facto Clause of the United States Constitution to 21 U.S.C. § 881, which provides for the forfeiture of property used in violation of controlled-substances laws, and concluding that because § 881 was primarily a civil-forfeiture provision, the Ex Post Facto Clause did not apply to it). In making its argument on this issue, KSE concedes that the forfeiture pursuant to § 13A-12-20 is civil in nature. However, KSE predicates its "ex post facto" argument on ex post facto *principles,* which are based on due-process protections.

In *Brooks v. Alabama State Bar,* 574 So.2d 33 (Ala. 1990), our supreme court relied on ex post facto principles in addressing a civil matter: the Alabama State Bar's imposition of disciplinary sanctions against a district attorney. In *Brooks,* supra, the supreme court reversed the order of discipline against the district attorney, concluding that due process prohibited the imposition of the disciplinary sanction because the district attorney did not have reason to believe that the conduct for which she was disciplined was governed by the Code of Professional Responsibility. In reaching its holding, our supreme court explained the relationship between ex post facto principles and due process as follows:

> "Due process of law requires fair notice that one's conduct is subject to a law or regulation.
>
> > "'The *ex post facto* principle applies to any activity in which a person engages with a reason to believe that it does not give rise to a particular penalty. This additional protection comes not from the *ex post facto* constitutional prohibition itself but from the "due process" clause of the Fifth amendment, which

> incorporates the same concept for judicial interpretations and holds that they rise to the level of a guaranty. *Marks v. United States,* 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977).'
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> "*United States v. Hayes,* 703 F.Supp. 1493, 1502 (N.D. Ala. 1989). Cf. Ala. Const. 1901, art. I, §§ 6, 7, and 13.
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> > "'The right to due process is guaranteed to the citizens of Alabama under the Alabama Constitution of 1901, Article 1, Sections 6 and 13. This constitutional right to due process applies in civil actions as well as criminal proceedings. *Pike v. Southern Bell Telephone and Telegraph Co.,* 263 Ala. 59, 81 So.2d 245 (1955). The courts have found that this right is violated when a statute or regulation is unduly vague, unreasonable, or overbroad.'
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> "*Ross Neely Express, Inc. v. Alabama Dep't of Environmental Mgt.,* 437 So.2d 82, 84 (Ala. 1983)."

Brooks v. Alabama State Bar, 574 So.2d at 34.

In 1996, the State legislature enacted § 13A-12-76, Ala. Code 1975, which provides an exception to the criminal gambling statutes for bona fide amusement machines that require the application of "some skill" in determining the outcome of the game.[2] In *Ex parte Ted's Game Enterprises,*

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[2] The precise language of the pertinent portion of § 13A-12-76, Ala. Code 1975, provides:

> "(a) Sections 13A-12-70 to 13A-12-75, inclusive, shall not apply to a coin-operated game or device designed and manufactured for

(Continued on following page)

supra, gaming machines similar to the ones seized in this case were at issue. In that case, Ted's argued that § 13A-12-76 exempted its machines from the criminal gambling statutes because, it maintained, its machines required some level of skill, albeit slight. Our supreme court addressed whether § 13A-12-76 violated Art. IV, § 65, Ala. Const. 1901, which prohibits Alabama's legislature from enacting a statute authorizing a lottery. The supreme court held that § 13A-12-76 may not "be applied so as to legalize games or activities in which skill does not *predominate over chance* in determining the outcome." *Ex parte Ted's Game Enters.*, 893 So.2d at 381 (emphasis added).

KSE argues that summary judgment was improper because its due-process rights to fair warning were violated. Specifically, KSE argues that on May 3, 2001 – the date on which the gaming machines were seized – it did not have "fair warning" that the gaming machines would later, through the issuance of the opinion in *Ex parte Ted's Game Enterprises,* supra, be determined to violate the criminal gambling statutes, and, therefore, that those machines would be subject to civil forfeiture. In making that argument, KSE contends that it relied on two circuit court judgments – the one that was reviewed in *Ex parte Ted's Gaming Enterprises,* supra, and another circuit court

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bona fide amusement purposes which, by application of some skill, only entitles the player to replay the game or device at no additional cost . . . , or rewards the player exclusively with merchandise limited to noncash merchandise, prizes, toys, gift certificates, or novelties, each of which has a wholesale value of not more than five dollars ($5)."

judgment[3] – in ascertaining and attempting to ensure that its gaming machines did not violate the criminal gambling statutes. KSE maintains that it "modified" its gaming machines in order to comply with those two circuit court judgments.

First, one of those two circuit court judgments was being reviewed in the appellate courts on appeal at the time the gaming machines in this case were seized, and the other judgment had been affirmed without an opinion, accompanied by a special writing indicating that the appeal had not addressed the constitutionality of the gaming machines at issue. Also, although KSE also referred to those two circuit court judgments in its summary-judgment motion, copies of those judgments are not contained in the record on appeal, and no motion has been filed asking this court to incorporate the record from the two appeals from those judgments. The State, however, in support of its opposition to KSE's motion for a summary judgment, submitted orders from other courts in which those courts found gaming machines such as the ones supplied to the gaming establishments by KSE to be

[3] KSE cites the circuit court judgment in *State v. Ray & Ann's Place* (CV-98-325, Montgomery Cir. Ct., Jan. 11, 1999), which was affirmed without an opinion by this court. *See State v. Ray and Ann's Place*, 765 So.2d 19 (Ala. Civ. App. 2000). We note that Judge Monroe's special concurrence in that case indicates that the trial court ordered that only one of three seized machines be forfeited as violative of the State's criminal gambling statutes. That writing further specifies that in affirming the trial court's judgment in that case, this court did not decide the issue whether those machines constituted illegal gambling devices, but, rather, that the court concluded that the State had failed to meet its burden in demonstrating that the machines should be forfeited.

illegal.[4] Although none of those judgments or orders are binding precedential authority, they indicate that there has been some conflict in the way courts in this State have treated gaming machines such as those owned by KSE. KSE does not explain why it relied on only the two circuit court judgments to which it cites but did not consider any of the other judgments or orders that reached a result different from that reached in those two judgments, nor does it make any attempt to explain why the disparity of the treatment of machines similar to those to which it claimed ownership in the lower courts did not serve to provide it "fair warning" of the possibility that its machines might be deemed to violate the State's criminal gambling statutes.

Also, before the May 3, 2001, seizure of KSE's gaming machines, four Justices of our supreme court issued an advisory opinion that indicated gaming machines such as those at issue in this case violated the criminal gambling statutes. *See Opinion of the Justices No. 373,* 795 So.2d 630 (Ala. 2001).[5] The court released *Opinion of the Justices*

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[4] Those orders included a November 11, 1999, denial of a motion to dismiss in *Pickard v. Funliner of Alabama, LLC, et al.* (CV-99-01092, Jefferson Cir. Ct., Bessemer Div.); a May 31, 2000, denial of a motion to dismiss in *State v. Anderson* (DC1999-3718, Jefferson Dist. Ct., Bessemer Div.); a May 31, 2000, denial of a motion to dismiss in *State v. Winfield* (DC1999-3709, Jefferson Dist. Ct., Bessemer Div.); and a June 2000 denial of a motion to dismiss in *State v. Thompson* (DC 1999-12033, Jefferson Dist. Ct.).

[5] We recognize that advisory opinions are not binding precedent, *see Opinion of the Justices No. 370,* 756 So.2d 21, 23 n. 1 (Ala. 1999), and *Opinion of the Justices No. 289,* 410 So.2d 388, 392 (Ala. 1982), and that only four Justices addressed the gambling/lottery issue in *Opinion of the Justices No. 373.* However, the thorough analysis set forth in *Opinion of the Justices No. 373* must be deemed to be more persuasive authority than the orders or judgments relied on by KSE in this appeal.

No. 373 on April 24, 2001 – before the May 3, 2001, search of the two gaming establishments that led to the seizure of the gaming machines currently at issue. In *Opinion of the Justices No. 373,* supra, four Justices on the supreme court rejected the argument that because some level of skill, however slight, might be employed in using the gaming machines, those machines did not violate the criminal gambling statutes.[6] In reaching its conclusion, the plurality opinion stated:

> "The better definition is that where the *dominant* factor in a participant's failure or success in any particular game or scheme is chance, the scheme is a lottery – despite the use of some degree of judgment or skill. Therefore, in Alabama the American Rule controls, and even if skill is present, it is the question whether chance dominates that determines whether a lottery exists. It is for the courts to determine, on a case-by-case basis, whether skill or chance dominates in an activity and, therefore, whether the activity is in the nature of a lottery."

Opinion of the Justices No. 373, 795 So.2d at 641. The plurality opinion later concluded:

> "Most American courts, and indeed the courts of Alabama, have long recognized the 'American

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[6] The question posed of the Justices in *Opinion of the Justices No. 373,* supra, concerned whether a Senate bill that would authorize a certain type of gambling constituted a revenue-raising bill that should originate in the House of Representatives. The Chief Justice and three Associate Justices declared the bill to be unconstitutional, thereby concluding that it cold not properly originate in either house. Three other Associate Justices determined that the bill was not a revenue-raising measure because it implicated the exercise of the State's police powers. Two Associate Justices declined to answer the question.

> Rule,' which labels as a lottery an activity in which a prize is awarded by chance and for consideration, when chance is the dominant element, even when a degree of skill may affect the outcome. We unequivocally reject the 'English Rule,' which would permit any activity where a prize is awarded by chance for a consideration, and in which some degree of skill is present, to escape the anti-lottery provision of § 65 of the Alabama Constitution."

Opinion of the Justices No. 373, 795 So.2d at 643. In reaching its holding in *Ex parte Ted's Game Enterprises,* supra, our supreme court relied on and quoted extensively from the plurality opinion in *Opinion of the Justices No. 373,* supra.

In their briefs on appeal, the parties cite to and base their arguments on a number of cases that have previously addressed issues pertaining to the legality or constitutionality of lotteries or gaming in Alabama. *See, e.g., Opinion of the Justices No. 358,* 692 So.2d 107 (Ala. 1997); *Opinion of the Justices No. 205,* 287 Ala. 334, 251 So.2d 751 (1971); *Minges v. City of Birmingham,* 251 Ala. 65, 36 So.2d 93 (1948); *Opinion of the Justices No. 83,* 249 Ala. 516, 31 So.2d 753 (1947); and *Loiseau v. State,* 114 Ala. 34, 22 So. 138 (1897). We do not think that a detailed analysis of those cases would serve any useful purpose. The plurality opinion in *Opinion of the Justices No. 373,* supra, thoroughly analyzed those cases, and it did so *before* the gaming machines at issue in this matter were seized; the analysis in that opinion was later adopted by a majority of the Supreme Court of Alabama in *Ex parte Ted's Game Enterprises,* supra. Given the foregoing, especially the timing of the release of *Opinion of the Justices No. 373,* supra, we reject KSE's argument that it did not have "fair

warning" that its gaming machines might violate Alabama's criminal gambling statutes and, therefore, that those machines would be subject to forfeiture pursuant to § 13A-12-20, Ala. Code 1975.

KSE has failed to demonstrate that the trial court erred in reaching its judgment; therefore, we affirm.

AFFIRMED.

Crawley, P.J., and Pittman, Murdock, and Bryan, JJ., concur.

IN THE CIRCUIT COURT
OF MOBILE COUNTY, ALABAMA

STATE OF ALABAMA
ex rel JOHN M. TYSON, JR.,
District Attorney for the
Thirteenth Judicial Circuit of
Alabama (Mobile County),
Plaintiff

v. CV 01-1949

76 ASSORTED GAMBLING DEVICES,
$5318.43 IN U.S. CURRENCY,
ASSORTED GIFT CARDS,
GIFT CERTIFICATES,
AND DOCUMENTS,
seized from
THE GAME ROOM/LUCKY 7
and KEVIN SHARP ENTERPRISES, Inc.,
Respondents.

STATE OF ALABAMA
ex rel JOHN M. TYSON, JR.,
District Attorney for the
Thirteenth Judicail Circuit of
Alabama (Mobile County),
Plaintiff,

v. CV 01-1952

51 ASSORTED GAMBLING DEVICES,
$6022 in U.S. CURRENCY,
ASSORTED GIFT CERTIFICATES,
GIFT CARDS AND DOCUMENTS,
seized from
THE MARDI GRAS ARCADE
and KEVIN SHARP ENTERPRISES,
Respondents.

ORDER

On August 20, 2004, the court heard argument on the Respondent's Motion for Summary Judgment and on the State's Motion for Summary Judgment.

The State's motion for summary judgment is granted as to all the games, currency and gift certificates seized from the Game Room/Lucky 7, and as to which the Game Room/Lucky 7 operator Clifton Sons has already disclaimed all interest, except that $2369 in currency which was seized from the interior of the game cabinets is to be returned to the Respondent Kevin Sharp Enterprises, Inc.

The State's motion for summary judgment is granted as to the games and $800 in currency seized from the attendants aprons at the Mardi Gras Arcade. The $472 seized from the interior of the game cabinets is to be returned to the Respondent Kevin Sharp Enterprises, Inc. The interest of the Mardi Gras Arcade operator John Kelly has previously been adjudicated.

The Respondent's Motion for Summary Judgment is Denied.

The It is further ORDERED that title to the above described currency and property is vested in the Mobile County District Attorney's Office as reimbursement of expenses of investigation and prosecution of this proceeding.

It is further ORDERED that the devices at issue shall be destroyed or otherwise disposed of by the District Attorney of Mobile County.

Costs taxed to the Respondent.

DONE on this 1 day of SEPT 2004.

/s/ Robert G. Kendall
CIRCUIT JUDGE

IN THE SUPREME COURT OF ALABAMA

[LOGO]

September 9, 2005

1041389

Ex parte Kevin Sharp Enterprises, Inc. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re: Kevin Sharp Enterprises, Inc. v. State of Alabama ex rel. John Tyson, Jr., District Attorney) (Mobile Circuit Court: CV 01-1949, CV 01-1952; Civil Appeals: 2040063).

CERTIFICATE OF JUDGMENT

Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

BOLIN, J. – Nabers, C.J., and See, Harwood, and Stuart, JJ., concur.

Ala.Code § 13A-12-30. Forfeiture of gambling devices and gambling proceeds.

(a) Any gambling device or gambling record possessed or used in violation of this article is forfeited to the state, and shall by court order be destroyed or otherwise disposed of as the court directs.

(b) Any vehicle possessed or used in violation of this article may be forfeited to the state and disposed of by court order as authorized by law.

(c) Money used as bets or stakes in gambling activity in violation of this article is forfeited to the state and by court order shall be transmitted to the general fund of the state.

(Acts 1977, No. 607, p. 812, § 6140.)

Ala.Code § 13A-12-76. Bona fide coin-operated amusement machines.

(a) Sections 13A-12-70 to 13A-12-75, inclusive, shall not apply to a coin-operated game or device designed and manufactured for bona fide amusement purposes which, by application of some skill, only entitles the player to replay the game or device at no additional cost if a single play of the bona fide coin-operated amusement machine or device can reach no more than 25 free replays or can be discharged of accumulated free replay, or rewards the player exclusively with merchandise limited to noncash merchandise, prizes, toys, gift certificates, or novelties, each of which has a wholesale value of not more than five dollars ($5). This subsection shall not apply to any game or device classified by the United States government as requiring a federal gaming tax stamp under applicable provisions of the Internal Revenue Code.

(b) Any person who gives to any other person money or anything of value for free replays on coin-operated devices described in subsection (a) shall be guilty of a Class A misdemeanor.

(c) Sections 13A-12-70 to 13A-12-75, inclusive, shall not apply to a crane game machine or device which meets the following requirements:

(1) The crane machine or device is designed and manufactured only for bona fide amusement purposes and involves at least some skill in its operation.

(2) For a single play of the crane machine or device, the winning player is rewarded exclusively with merchandise contained within the machine itself and the merchandise is limited to noncash merchandise, prizes, toys, gift certificates, or novelties, each of which has a wholesale value not exceeding five dollars ($5).

(3) The player of the crane machine or device is able to control the timing of the use of the claw or grasping device to attempt to pick up or grasp a prize, toy, or novelty.

(4) The player of the crane machine or device is made aware of the total time which the crane machine or device allows during a game for the player to maneuver the claw or grasping device into a position to attempt to pick up or grasp a prize, toy, or novelty.

(5) The claw or grasping device is not of a size, design, or shape that prohibits picking up or grasping a prize, toy, or novelty contained within the crane machine or device.

(6) The crane machine or device is not classified by the United States government as requiring a federal gaming stamp under the Internal Revenue Code.

(d) A player of a bona fide coin-operated amusement machine may accumulate winnings for the successful play of a bona fide coin-operated amusement machine through either tokens or tickets, and may redeem these tokens or tickets for merchandise so long as the amount of tokens or tickets earned on a single play does not exceed five dollars ($5) per unit.

(e)(1) For purposes of this section, "bona fide coin-operated amusement machine" means every machine of any kind or character used by the public to provide amusement or entertainment whose operation requires the payment of or the insertion of a coin, bill, other money, token, ticket, or similar object, and the result of whose operation depends in whole or in part upon the skill of the player, whether or not it affords an award to a successful player, and which can be legally shipped interstate according to federal law. Examples of bona fide coin-operated amusement machines include, but are not limited to, the following:

a. Pinball machines.

b. Console machines.

c. Video games.

d. Crane machines.

e. Claw machines.

f. Pusher machines.

g. Bowling machines.

h. Novelty arcade games.

i. Foosball or table soccer machines.

j. Miniature racetrack or football machines.

k. Target or shooting gallery machines.

l. Basketball machines.

m. Shuffleboard games.

n. Kiddie ride games.

o. Skeeball machines.

p. Air hockey machines.

q. Roll down machines.

r. Coin-operated pool table or coin-operated billiard table.

s. Any other similar amusement machine which can be legally operated in Alabama.

t. Every machine of any kind or character used by the public to provide music whose operation requires the payment of or the insertion of a coin, bill, other money, token, ticket, or similar object, such as jukeboxes or other similar types of music machines.

(2) The term "bona fide coin-operated amusement machine" does not include the following:

a. Coin-operated washing machines or dryers.

b. Vending machines which for payment of money dispense products or services.

c. Gas and electric meters.

d. Pay telephones.

e. Cigarette vending machines.

f. Coin-operated scales.

g. Coin-operated gumball machines.

h. Coin-operated parking meters.

i. Coin-operated television sets which provide cable or network programming.

j. Machines which are not legally permitted to be operated in Alabama.

k. Slot machines.

l. Video poker games.

(f) Any person owning or possessing an amusement game or device described in subdivision (1) of subsection (e) or any person employed by or acting on behalf of another person who gives to another person money for noncash merchandise, prizes, toys, gift certificates, or novelties received as a reward in playing an amusement game or device shall be guilty of a Class A misdemeanor.

(Acts 1996, No. 96-588, p. 928, § 1.)